Supreme Court of the United States.

No. 46.—DECEMBER TERM, 1868.

THE UNITED STATES, APPELLEES,

vs.

THE STEAMBOAT LOUIS D'OR.

BRIEF OF COUNSEL OF CHENEY JOHNSON, CLAIMANT AND APPELLANT.

On the 8th July, 1865, the United States district attorney in Louisiana filed a libel of information against the steamboat Louis d'Or, under the act of 6th June, 1861.

12 Stats. at Large, 319.

The evidence in the record is addressed to that portion of the libel which charges that the owners of the boat consented to her use and employment for the purpose of aiding the insurrection.

See libel, print. Rec., art. 4, pt. 4, p. 2.

The claimant averred, the truth was, that the steamboat never was so used by the will and consent of her owner to aid the enemies of the United States, who exerted upon him intimidation, force, and pressure.

After hearing evidence and argument, the court below condemned the boat, and the claimant has appealed.

The facts of this case, as shown by the witnesses, were as follows:

1. The Louis d'Or was not seen in use by the rebel authorities until 1863, when she was ordered to take on board commissary stores, by written orders of the rebel military authorities.

Test. of Geo. D. Hite for libellants, print. Trans., pp. 12 and 13.

2. At another time, the Louis d'Or was taken possession of by the rebel military agents to transport prisoners; and Captain Johnson, who had his wife and children on board at the time, was compelled to land them.

Test. of Szymanski for libellant, print. Trans., p. 14.

3. The Louis d'Or was taken, by possession, by the rebel quartermaster's department at first, and then turned over to the commissary department.

Test. of Cellos, print. Trans., p. 15.

4. At another time, the Louis d'Or was commanded by the rebel engineer department, to transport the implements of a machine-shop from Alexandria to Shreveport, Red river.

Test. of J. C. Marsh, p. 16.

5. All these services were performed under military orders, which could not be resisted or evaded, in a region where the rebel troops had complete control, and where the forces of the United States were defeated when they entered.

See test. of same witness above quoted; and that of W. C. Smith on printed Trans., p. 20.

6. Each one of these services was performed under what was styled impressment, or the application of overpowering military force. On each occasion, there was on board of her a confederate military officer; *who had full charge of the boat, and made her go where he chose.* Every trip was made with such a confederate officer on board, and under orders.

Test. of W. C. Smith, print. Trans., p. 19, *ad fin.*

7. There was no possibility of escaping from the rebel control into the federal lines; had he attempted to do so, Capt. Johnson would have lost his life.

Test. of Smith, print. Trans., pp. 20 and 21.

8. Captain Johnson, the owner of the Louis d'Or, on the 22d June, 1865, availed himself of the President's proclamation of pardon and amnesty.

See print. Trans., p. 22.

This was eighteen days before the Louis d'Or was libelled, which was on the 11th July, 1865.

See print. Trans., p. 4.

POINTS.

1. The burden of proof to show consent is in the Government; and it must be proved either directly, or by showing such circumstances as imply consent beyond a reasonable doubt.

2. There is no proof in the record of any direct consent of Captain Johnson to the use of his boat by the rebels; they in no case asked his consent; they ordered him, and enforced the order by military law and the presence of a military force and the attendance of a military officer.

3. As consent to such employment would have been criminal, it is not presumed. Forcible resistance would have been fruitless; escape impossible; to attempt it death; in such case, even passive obedience, and here much reluctance was shown, would not raise the legal presumption of consent.

4. The act of the Captain and owner, in availing himself of the amnesty and pardon of the President, has exempted his property from confiscation, even had he been guilty.

Respectfully submitted.

THOMAS J. DURANT.
For Appellant.

DECEMBER 10, 1868.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE STEAMER LOUIS D'OR, CHENEY JOHNSON, claimant, *vs.* THE UNITED STATES. } No. 46.

Appeal from the Circuit Court of the United States for the eastern district of Louisiana.

STATEMENT FOR THE UNITED STATES.

In this case, a decree of condemnation was rendered by the court below against the steamer, as forfeited to the United States, under the Act of Aug. 6, 1861; and the only question here raised appears to be one of fact, viz: whether the property was liable to forfeiture.

The libel, after referring to the seizure of the vessel, the provisions of said act, and the proclamations of the President declaring an insurrection to exist against the authority of the United States, charges among other things that the same was knowingly used and employed by its owner or owners, and that he or they did knowingly consent to the use and employment thereof, in aiding, abetting, and promoting said insurrection, after the approval of said act and after the proclamations above referred to, whereby the property became forfeited, etc. (Record, p. 1 and 2.)

The claimant, Cheney Johnson, of Franklin, La., in his answer denies generally the allegations of the libel, and avers that the steamer "never was used by

the will and consent of her owner, or of his lawful agent, to aid the enemies of the United States," and that if the latter or the so-called confederate government used the same it was "by intimidation and force and pressure." (Record, p. 6.)

1. The testimony leaves no room for doubt that the steamer was employed in the rebel service on Red river and elsewhere, in the years 1862, 1863, and 1864, either by the owner himself knowingly, or with his approbation and consent. Marsh states that in 1862 he saw her at Alexandria on Red river, from whence she transported confederate commissary stores and other property, and also officers and soldiers of the rebel army to Shreveport; that he saw her again, in 1863, going down the same river with confederate soldiers, and that Johnson (meaning the owner) was on board of her on both these occasions. (Record p. 16.) Withenbury says that in the summer and fall of 1862 she carried sugar for the rebel government from a point on the Mississippi river to Vicksburg; that she was also employed in carrying confederate corn in the winter of 1863, up to the time Admiral Farragut's fleet passed Port Hudson; that she was there when the federal fleet attacked the place, and left partly unloaded and returned to Red river; and from his testimony it would seem that Johnson was with his boat during all this time. (Record p. 17.) Hite says that two days before the capture of New Orleans the steamer left that place for Vicksburg, between which points she was employed in carrying the confederate mail; that in 1863 she was also engaged in carrying confederate commissary stores and corn on Red river, and during same year he saw rebel soldiers on board of her going from one point to another on same river; and that Capt. Johnson (the owner) was on board all the time. (Record p. 12 and 13.) Szymanski swears that she was in rebel employ in the fall of 1862, carrying prisoners of war from Vicks-

burg to Carrolton for exchange, during which time Capt. Johnson was with her. (Record p. 14.) Finally, Cellos testifies that in 1864 she was employed in the rebel commissary department to carry corn from below Shreveport to the neighborhood of Alexandria, making several trips, during which Johnson was in command of the boat. (Record p. 15.) This evidence conclusively establishes the employment of the boat in the rebel service by and with the knowledge of the owner.

2. On the other hand there is no proof of compulsion, or of any other fact that sustains the defence set up. Smith says that on several occasions the steamer was impressed into service by the confederate military authorities, (Record p. 19;) but he states that by impressment he means only that she was "ordered to do so and so." (Record p. 21.) It is quite probable that the services performed by the boat were for the most part done pursuant to orders; and this would have been the case had she been running under a charter. Everything in the military service, almost, is required to be done under orders; for such is the nature of this service that it cannot be efficiently administered in any other way. Hence it cannot be assumed that because service may have been performed under a military order, such service was not voluntary, or that it was performed against the will and consent of the individual. So that to establish a compulsory employment of the steamer in this case against the owner's consent, something more is needed than evidence that the services were rendered under military orders. It should appear that actual force or intimidation was used, of which the testimony here shows nothing.

The oath of allegiance filed by the claimant (Record p. 22), with a view, perhaps of availing himself of the benefit of the amnesty proclamation of the President of Dec. 8, 1863, is insufficient as a defence; there be-

ing no evidence that he was not included among those who were excluded from amnesty thereby. Nor is the pardon granted by the President June 25, 1866, (Record p. 33 and 34), an adequate protection here; as its conditions do not appear to have been complied with.

It is accordingly submitted that, upon the testimony appearing herein, the decree of the court below ought to be affirmed by this court.

J. Tubley Ashton
Asst. Attorney General.